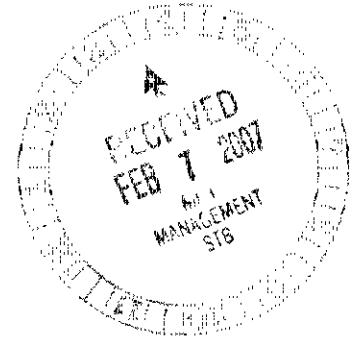


BEFORE THE  
SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY --  
ABANDONMENT EXEMPTION --  
IN OKLAHOMA COUNTY, OK

STB DOCKET NO. AB-6  
(SUB-NO. 430X)

218594

STILLWATER CENTRAL RAILROAD,  
INC. - DISCONTINUANCE OF SERVICE  
EXEMPTION - IN OKLAHOMA  
COUNTY, OK

STB DOCKET NO. AB-  
1040X

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MOTION TO REJECT  
REQUEST FOR EXTENSION OF TIME TO FILE AN OFA

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Attorneys for BNSF Railway Company

Attorney for Stillwater  
Central Railroad, Inc.

DATED: February 7, 2007

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**BNSF RAILWAY COMPANY --  
ABANDONMENT EXEMPTION --  
IN OKLAHOMA COUNTY, OK**

**STB DOCKET NO. AB-6  
(SUB-NO. 430X)**

**STILLWATER CENTRAL RAILROAD,  
INC. – DISCONTINUANCE OF SERVICE  
EXEMPTION – IN OKLAHOMA  
COUNTY, OK**

**STB DOCKET NO. AB-  
1040X**

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**MOTION TO REJECT  
REQUEST FOR EXTENSION OF TIME TO FILE AN OFA**

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BNSF RAILWAY COMPANY (“BNSF”) and STILLWATER CENTRAL RAILROAD, INC. (“SLWC”) hereby move for rejection of the request for an extension of time to file an Offer of Financial Assistance (“OFA”) filed by Common Cause *Oklahoma* (“CCO”) in a letter dated February 5, 2007 (the “Letter”).

The Letter should be rejected because: (1) CCO missed the October 24, 2005 deadline to submit a formal expression of intent to file an OFA and failed to file an OFA before the Notice became effective on November 12, 2005 in STB Docket No. AB-6 (Sub-No. 430X); and (2) CCO seeks an extension to file an OFA to acquire the rail lines over which SLWC is discontinuing operations in STB Docket No. AB-1040X, which is not permitted in a discontinuance proceeding. In any event, neither type of OFA should be permitted in these two proceedings since there are no shippers located on the 2.95-miles of rail lines. As the record in these two proceedings makes abundantly clear, the

parties opposing the abandonment and discontinuance of service are not seeking to preserve rail service, rather they seek to disrupt a highway project.

### **Background**

On September 23, 2005, BNSF and SLWC jointly filed Notices seeking to invoke the class exemption under 49 C.F.R. § 1152, Subpart F for BNSF to abandon, and for SLWC to discontinue service over, approximately 2.95 miles of railroad between milepost 539.96 and milepost 542.91 in Oklahoma City, Oklahoma County, OK. Notice of the exemptions was served and published in the Federal Register on October 13, 2005 (70 FR 59802).

On November 7, 2005, Oklahoma State Representative Al Lindley (“Representative Lindley”) and Bio-Energy Wellness Center (“Wellness Center or the Center”) filed comments urging that the Notices be rejected. On November 9, 2005, petitioners filed a joint petition to reject the Notices of exemption. BNSF and SLWC replied to those filings on November 10, 2005.

The BNSF abandonment Notice became effective on November 12, 2005.

Subsequently, the parties filed various pleadings related to the request to reject the Notices through February 2006.

On January 26, 2007, the Board served a decision denying petitioner’s motion to reject the BNSF Notice and granting SLWC an exemption permitting it to discontinue service over the line. In that decision, the Board also ordered that an OFA to subsidize

continued rail service in the SLWC discontinuance proceeding must be received by the railroads and the Board by February 5, 2007.

As previously noted, on February 5, 2007, CCO filed its Letter requesting a two week extension of time to “obtain additional information” related to a possible “offer for purchase of the two and a half mile segment of railroad” and “the prospect of obtaining sufficient money from interested investors”.<sup>1</sup>

### **Argument**

#### **1. CCO Missed the Deadline to File an OFA to Acquire the Rail Line .**

CCO missed the deadline to file an OFA to acquire the rail line in STB Docket No. AB-6 (Sub-No. 430X). Under 49 C.F.R. 1152.27(c)(2)(i), “persons with a potential interest in providing financial assistance must, no later than 10 days after the Federal Register publication...submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide.” Furthermore, under 49 CFR 1152.27(c)(2)(ii)(B), “an offer, or notification of a previously filed offer, must be filed and served no later than 30 days after the Federal Register publication.”

CCO admits in its Letter that notice of the abandonment was published in the Federal Register on October 13, 2005. It is immaterial whether or not CCO was “unaware” of the October 13, 2005 publication as stated in its Letter. The regulations clearly state an intent to file an OFA must be submitted within 10 days of the publication,

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<sup>1</sup> CCO concedes that it is not a financially responsible party within the meaning of 49 U.S.C. § 10904.

and the OFA must be filed within 30 days of the publication. CCO's February 5, 2007 Letter is clearly untimely under 49 C.F.R. § 1152.27(c)(2). Furthermore, BNSF's abandonment exemption became effective on November 12, 2005.

CCO is attempting to thwart the procedural process established by 49 C.F.R. § 1152.27(c)(2) for the filing of OFAs. A party cannot, however, use a backdoor to circumvent clearly established procedural time limits. See, e.g. I.C.C. v. Brotherhood of Locomotive Engineers, 483 U.S. 270, 107 S. Ct. 2360 (1987). Since CCO missed the deadline to file an OFA in STB Docket No. AB-6 (Sub-No. 430X) and the exemption in that proceeding has been in effect for well over a year, CCO's Letter is clearly untimely.

## 2. CCO Impermissibly Seeks a Purchase OFA in STB Docket No. AB-1040X.

CCO seeks an extension of time not to file a subsidy OFA but rather to file an OFA to acquire the rail line. CCO attempts to excuse its late-filing by pointing out that the decision does not become effective until February 25, 2007. The February 25<sup>th</sup> effective date, however, applies only to the proceeding in STB Docket No. AB-1040X. As previously noted, the exemption in STB Docket No. AB-6 (Sub-No. 430X), became effective in 2005. The OFA process, however, is not available in a discontinuance proceeding to a party seeking to acquire the line. See STB Docket No. AB-156 (Sub-No. 25X), *Delaware and Hudson Railway Company, Inc. – Discontinuance of Trackage Rights Exemption – In Susquehanna County, PA and Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Erie, and Genesee Counties, NY* (not printed), served February 3, 2005. Moreover, the Board's ordering paragraph No. 7 in the January 26<sup>th</sup> decision provides that interested parties may file an OFA "to allow rail service to

continue” and not for the acquisition of the rail line. Slip op. at 7. Also, ordering paragraph No. 9 provides for the filing of an OFA only in the STB Docket No. AB-1040X proceeding. Since CCO is only interested in acquiring the rail line through the OFA process, which it may not do in the discontinuance proceeding, the requested extension should be rejected.


Moreover, in the January 26<sup>th</sup> decision, the Board found that there are no shippers located on the sections of track involved in the discontinuance proceeding. Slip op. at 5. Without any shippers to serve, there is no lawful reason for CCO to seek an OFA, either through acquisition or subsidy. The OFA process was established as a means to preserve rail service and not as a device to be used by disgruntled entities seeking to block highway projects.

### **Conclusion**

CCO’s Letter should be rejected because CCO missed the deadline to file an OFA in STB Docket No. AB-6 (Sub. No. 430X) and impermissibly seeks an OFA in STB Docket No. AB-1040X.

Respectfully submitted,

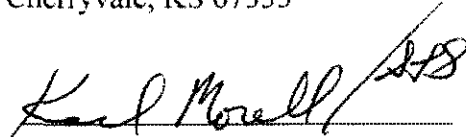
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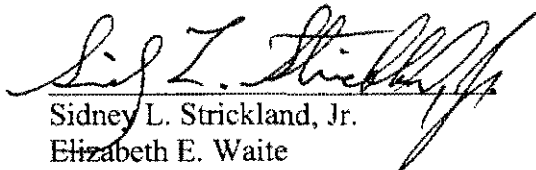
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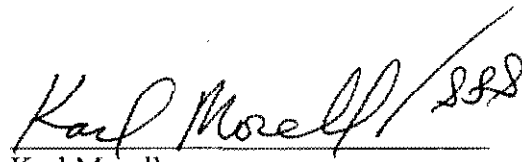
DATED: February 7, 2007

## CERTIFICATE OF SERVICE

BNSF Railway Company and the Stillwater Central Railroad, Inc., by and through their counsel, Sidney L. Strickland, Jr., and Karl Morell, respectively, certify that on February 6, 2007, BNSF and SLWC served a copy of the foregoing Motion to Reject Request for Extension of Time to File an OFA by facsimile transmission and by mailing copies thereof by first-class mail to Common Cause *Oklahoma's* Vice-Chair, Edwin Kessler at: Common Cause *Oklahoma*, 1510 Rosemont Drive, Norman, Oklahoma, 73072.

  
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